Hong Leong Bank Bhd v Lee Khai Sin

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-212 OF 2004-II
HAMID SULTAN JC
25 APRIL 2007

Civil Procedure — Costs — Appeal as to costs — Relevant principles of law applicable in an appeal or review of taxation

Civil Procedure — Costs — Power to award costs — Application to review taxation — Whether Deputy Registrar had powers under Order 59 Rules of the High Court 1980 to award costs of review

Civil Procedure — Costs — Getting up fee — Factors to be considered in awarding getting up fee

Civil Procedure — Costs — Principles governing award of costs — Whether Deputy Registrar in deciding the quantum had erred on questions of principles or had failed to take into account relevant consideration

The plaintiff filed an application for order for sale pursuant to s 148(2)(c) of the Sarawak Land Code ('the SLC') which was dismissed with costs to be taxed and paid to the defendant. Thereafter, the defendant filed an application for taxation before the registrar and sought getting up fees of RM40,000. The learned deputy registrar however granted a sum of RM5,000 for getting up fees. The defendant being dissatisfied with the decision filed a request to review taxation pursuant to O 59 r 34 of Rules of the High Court 1980 ('the RHC') which was subsequently dismissed by the learned deputy registrar with an order for the defendant to pay costs amounting to RM500 to the plaintiff. Again being dissatisfied with the learned deputy registrar's decision, the defendant then filed this 'summons to review taxation by judge' pursuant to O 59 r 36 (1) of the RHC to review the decision of the learned deputy registrar. In respect of this review, the defendant submitted, inter alia, that (a) the defendant applied to review the getting up fees of RM5,000 on the ground that it was manifestly low and/or that it was not based on established principles nor did it reflect the amount of work and skill required by the defendant's counsel to oppose the plaintiff's originating summons; (b) the award of RM500 to the plaintiff was an unilateral award being made by the learned taxing registrar with no regards to the merits and the facts of the case; and (c) it would be more proper for the learned taxing registrar to order the costs to be taxed. In opposing the review, the plaintiff submitted, inter alia, that (a) the defendant's request to the judge to review taxation herein was only in respect of the quantum of costs awarded; (b) since the review was

only in regards to the quantum of costs for getting up, it should not be changed unless there was an error of principle on the part of the taxing registrar in fixing the amount; (c) the learned deputy registrar had not erred in principle in exercising his discretion in awarding the getting up; and (d) the learned deputy registrar had the powers and discretion to grant costs to the plaintiff.

Held, dismissing the application with costs:

(1) On the issue of quantum, it is apparently clear that the applicant had only succeeded on a procedural point and in ordinary circumstance the getting up fees should have been less than RM2,000 as there is no finality and the plaintiff can re-file the charge action. The learned deputy registrar in this case has been very generous with the award of RM5,000 for the getting up fees (see para 9).

(2) The learned deputy registrar in deciding the quantum had not erred on questions of principles or had failed to take into account some relevant consideration (see para 8).

(3) The application for taxation or review is an incidental proceedings in an action and the registrar has sufficient powers under O 59 to award costs of review as he deems fit. The court may also order costs for this 'summons to review taxation by the judge'. It will be preferable in such cases to award a fixed sum of costs as was done by the learned deputy registrar (see para 11).

(4) The plaintiff/respondent should be granted costs as the lengthy arguments put forward by the defendant/applicant on settled principles of law has taken much of the plaintiff's as well as judicial time (see para 11).

(5) The order of the learned deputy registrar must be sustained and the defendant's application for review must be dismissed. Further, the defendant/applicant must pay the sum of RM3,000 to the plaintiff/respondent as costs for this review made under O 59 r 36(1) of the RHC (see para 12).

[Bahasa Malaysia summary

Plaintif telah memfailkan permohonan untuk perintah penjualan menurut s 148(2)(c) Kanun Tanah Sarawak (KTS) yang telah ditolak dengan kos untuk ditaksirkan dan dibayar kepada defendan. Kemudiannya, defendan memfailkan permohonan untuk taksiran di hadapan pendaftar dan memohon yuran penyediaan guaman sebanyak RM40,000. Timbalan pendaftar yang bijaksana walau bagaimanapun membenarkan sejumlah RM5,000 sebagai yuran penyediaan guaman. Defendan yang tidak berpuas hati dengan keputusan telah memfailkan permintaan untuk mengkaji semula taksiran menurut A 59 k 34 Kaedah-kaedah Mahkamah Tinggi 1980 ("KMT") yang kemudiannya ditolak oleh timbalan pendaftar yang bijaksana dengan perintah untuk defendan membayar kos berjumlah RM500 kepada plaintif. Sekali lagi, akibat tidak berpuas hati dengan keputusan timbalan pendaftar yang bijaksana, defendan memfailkan Saman untuk mengkaji semula taksiran oleh Hakim menurut A 59 k36(1) KMT bagi menyemak keputusan timbalan pendaftar yang bijaksana. Berkenaan kajian semula ini, defendan menghujahkan, antara lain, bahawa (a) defendan telah memohon untuk kajian semula yuran penyediaan guaman

sebanyak RM5,000 atas alasan bahawa jelas benar ia terlalu rendah dan/atau ia tidak berdasarkan kepada prinsip-prinsip sedia ada maupun ia tidak membayangkan jumlah kerja dan kemahiran yang diperlukan oleh peguam defendan bagi menentang saman pemula plaintif; (b) keputusan award sebanyak RM500 kepada plaintif adalah award yang melibatkan sebelah pihak yang dibuat oleh pendaftar taksiran yang bijaksana tanpa mengambil kira merit dan juga fakta kes; dan (c) ia adalah lebih tepat lagi jika pendaftar taksiran yang bijaksana untuk memerintahkan kos untuk ditaksirkan. Untuk menentang kajian semula, plaintif menghujahkan, antara lain, bahawa (a) permintaan defendan kepada hakim bagi membuat kajian semula adalah hanya untuk kuantum kos yang telah diberikan; (b) memandangkan kajian semula hanya dalam bentuk kuantum kos bagi penyediaan guaman, ia tidak akan berubah melainkan terdapat kesalahan prinsip dipihak pendaftar taksiran dalam menentukan jumlah tersebut; (c) Timbalan pendaftar yang bijaksana tidak khilaf secara prinsipnya dalam menggunakan budi bicaranya ketika memberikan award penyediaan guaman; dan (d) timbalan pendaftar yang bijaksana mempunyai bidang kuasa dan budi bicara untuk membenarkan kos kepada plaintif.

Diputuskan, menolak permohonan dengan kos;

(1) Untuk isu kuantum, adalah nyata dan jelas bahawa pemohon hanya berjaya dalam perkara prosedural dan dalam keadaan biasa yuran penyediaan guaman seharusnya kurang dari RM2,000 memandangkan tidak ada kemuktamadan dan plaintif boleh memfailkan semula tindakan gadaian. Timbalan pendaftar yang bijaksana sangat bermurah hati dengan award iaitu RM5,000 untuk fee penyediaan guaman (lihat perenggan 9).

(2) Timbalan pendaftar yang bijaksana ketika memutuskan quantum tidak sesekali khilaf dalam persoalan prinsip ataupun telah gagal untuk mengambil kira sesetengan balasan yang berkaitan (lihat perenggan 8).

(3) Permohonan untuk taksiran atau kajian semula adalah prosiding sampingan dalam sesuatu tindakan dan pendaftar mempunyai cukup kuasa di bawah A 59 untuk memberikan kos sebagimana difikirkan perlu. Mahkamah juga akan memerintahkan kos terhadap Saman untuk kajian semula taksiran oleh hakim. Adalah lebih baik dalam sesetengah kes untuk memberikan jumlah tetap terhadap kos sebagaimana yang dilakukan oleh timbalan pendaftar yang bijaksana (lihat perenggan 11).

(4) Plaintif/responden sepatutnya mendapat kos memandangkan hujah panjang lebar yang dibentangkan oleh defendan/pemohon bagi prinsip perundangan yang tetap telah mengambil masa yang banyak di pihak plaintif dan kehakiman (lihat perenggan 11).

(5) Perintah yang diberikan oleh timbalan pendaftar yang bijaksana hendaklah dikekalkan dan permohonan defendan untuk kajian semula mesti ditolak. Selanjutnya, defendan/pemohon hendaklah membayar sejumlah RM3,000.00 kepada plaintif/respondenbagi kos untuk kajian semula dibawah A59 k36(1) KMT (lihat perenggan 12).]

Notes

For cases on appeal as to costs, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1688–1689.

For the case on power to award costs, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1828.

For cases on principles governing award of costs, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1832–1836.

For cases on getting-up fee, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1753–1762.

Cases referred to

Alliance Bank Malaysia Berhad v Chang Joo Pin@ Chong Voon Bin (unreported; Miri High Court Originating Summons No 24–239 of 2003(MR) (refd)

Chan Kok Choon JP v MBF Finance Bhd [2001] 1 MLJ 5 (refd)

Co-operative Central Bank Ltd v Tan Nyap How [1997] 4 MLJ 568 (refd)

Chen Teti v Ornaresort Bhd [2003] 3 CLJ 91 (refd)

Donald Campbell & Co Ltd v Pollak Gooi Hock Seng v Chuah Guat Khim, Pemegang Harta Pesaka Bagi Eset Chuah Teow Hock, simati [2002] 3 AMR 3683 (refd)

Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors [2002] 3 MLJ 705 (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25 (refd)

Perwira Affin Bank Bhd v KI Production Sdn Bhd [2000] 4 MLJ 652 (refd)

Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3) [1998] 7 MLJ 168 (refd)

Tan Ah Chim & Sons Sdn. Bhd v Ooi Bee Tat & Anor [1993] 4 CLJ 176 (refd)

Teo Ah Khing v Yii Chee Ming [2006] 2 CLJ 188 (refd)

Tan Boon Bak Trading Sdn Bhd. v Chua Choong Yin [2004] 3 CLJ 695 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn. Bhd [1994] 3 MLJ 777 (refd)

United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd [1991] 3 MLJ 181 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(c)

Rules of the High Court 1980 O 59 r 3(2), r 36(1), O 59 r 34, O 83

Alicia Voon (Alvin Chong & Partners) for the plaintiff.

Kenny Yi (Yi & Co) for the defendant.

Hamid Sultan JC:

[1] This is my judgment in respect of the defendant's 'summons to review taxation by judge' (encl 86) pursuant to O 59 r 36(1) of the Rules of the High Court 1980 ('the RHC') to review the decision of the learned deputy registrar.

[2] The plaintiff in this case is a chargee who applied for order for sale pursuant to s 148(2)(c) of the Sarawak Land Code ('the SLC') to foreclose the defendant's property to satisfy the outstanding sum of RM411,772.46 as at 25 April 2004.

The defendant opposed the foreclosure proceedings on various grounds. However, the court found that the statutory notice under s 148(3) of the SLC given by the plaintiff failed to comply with the term of the said charge and ruled that the statutory notice was null and void for non-compliance of a clause in the said charge. In consequence, the court held that it was not just to grant the order for sale and dismissed it with costs with an order that the costs to be taxed and paid to the defendant.

[3] The defendant thereafter filed his application for taxation before the registrar seeking a getting up fees of RM40,000. The learned deputy registrar granted a sum of RM5000 for getting up fees. Dissatisfied with the decision, the defendant filed a request to review taxation pursuant to O 59 r 34 of the RHC on the following grounds:

(a) The getting up fee of only RM5,000 allowed is manifestly low and inadequate and is not made and/or based on established principles nor does it reflect the amount of work and skill required for the following reasons:

  (i) the getting up allowed has totally ignored the fact that it concerned an originating summons wherein the plaintiff is applying for an order for sale in respect of an immovable property.

  (ii) the hearing of the originating summons before the judge took considerable amount of work and time.

  (iii) that the subject matter herein being an immovable property has its own special value.

  (iv) that the learned taxing registrar has erred in law and in fact in failing to consider and/or to adopt the unreported case of Miri High Court Originating Summons No 24–239–2003(MR) wherein the learned High Court Judge allowed the getting up fee of RM10, 000 to the defendant for striking out of the plaintiff's originating summons therein.

[4] In opposing the review before the learned registrar, the plaintiff's answers were as follows:

(a) the learned deputy registrar has correctly applied his discretion by awarding the amount of RM5,000 for the getting up fee.

(b) the sum is more than adequate and is a reasonable amount for the amount of work done and skill required having considered the established principles and law and to the circumstances of the case.

[5] The learned deputy registrar in his judgment had given a detailed consideration of the defendant as well as the plaintiff's submission and stated, inter alia, as follows:

(a) Though the value of the subject matter in the action was RM411,772.46, that does not mean that the defendant is entitled to a higher rate of getting-up after considering the nature of the action and/or the proceedings before the court.

(b) The action before the High Court was a foreclosure/charge action pursuant to O 83 of the RHC and s 148(2) of the SLC and the law on that point is settled and nothing novel and complicated about that.

(c) The defendant's submission that the getting-up in a foreclosure proceedings should be at least RM10,000 is not correct. This seems to be putting a standard amount that should be awarded and in awarding a getting-up, when that it should be considered on a case to case basis.

(d) The case of *Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3)* [1998] 7 MLJ 168 as quoted by the defendant, may not be relevant to this case as in the said case the court ruled that the issues that the court need to determine in the said case does not confine merely to two issues only. Further in the said case, it involves 34 properties and the total sum claimed by the plaintiff was in the region of RM10m and unlike this case, it involves one piece of land.

(e) *United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181 relied by the applicant can be distinguished with this case. In this case, the issue is on getting-up fees only. Further, the facts of the said case is totally not the same in nature to this case. That case, is a case which dealt with setting aside of an order for sale by the chargor. In *Chen Teti v Orna Resort Bhd* [2003] 3 CLJ 91, Low Hop Bing J said:

> The taxation of costs in respect of an application etc which is not of the same type of application being considered by the learned registrar are not helpful to the defendant in determining the quantum for getting-up.

(f) The case of Miri High Court OS No 24–239–2003(MR) was not deliberated here with the facts and why the action was struck out. Whether the nature and the facts in the proceedings in Miri High Court is the same or otherwise remains mystery and therefore without clear and proper facts produced before this court, the award for getting up fees should be on a case to case basis.

(g) The order made for getting up fees of RM5,000 is sustained and the defendant's request to review taxation is dismissed with an order that the defendant to pay costs in the sum of RM500 to the plaintiff.

[6] In respect of this review, the defendant submits as follows:

(a) The learned taxing registrar upon application for review by the defendant maintained the getting up fee at RM5,000 and further awarded costs of RM500 to the plaintiff for the dismissal of the defendant's application for review.

(b) The defendant applied to review the getting up fees of RM5,000 on the ground that it was manifestly low and/or that it was not based on established principles nor does it reflect the amount of work and skill required by the defendant's counsel to oppose to the plaintiff's originating summons.

(c) The total sum claimed by the plaintiff in this action was RM411,772.46 as at 25 April 2004 together with interest at the rate of 8% per annum on monthly

rest inclusive of additional interest of 1% per annum, which continues to be chargeable in respect of the outstanding sum of the term loan facility from 26 April 2004 until the date of full settlement.

(d) It can not be disputed that efforts and time had been spent reading the memorandum of charge (which is made up of 27 pages), the facilities agreement of 59 pages and letters of demand and statutory notice to ascertain the plaintiff's cause of action against the defendant.

(e) The defendant's counsel also had researched on this area of law to enhance the chances of success of the defendant as the subject matter of this originating summons is an immovable property which has its own special value which could not be compensated by any award of costs or damages and in support relies on the following authorities:

(i) *Perwira Affin Bank Bhd v KI Production Sdn Bhd* [2000] 4 MLJ 652

(ii) *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 and

(iii) *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn. Bhd* [1995] 1 CLJ 15.

(iv) *In Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3)* [1999] 4 CLJ 754, the learned RK Nathan J allowed RM30,000 as the getting up fees to the defendant for their application to set aside an order for sale.

(v) In *United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181, the High Court awarded getting up fees of RM65, 658.45 to the defendant for an application to set aside an order for sale.

(vi) In *Alliance Bank Malaysia Berhad v Chang Joo Pin @ Chong Voon Bin (Unreported; (Miri High Court Originating summons No 24–239* 2003(MR)), the learned High Court Judge, Dato' Abdul Aziz Bin Abdul Rahim reviewed and allowed the getting up fees of RM10,000 to the defendant for the withdrawal of the originating summons by the plaintiff as the defendant was wrongly sued by the plaintiff.

(f) In view thereof, it is undisputed that ample time was involved and vast work had been done by the defendant's counsel in preparing to oppose the plaintiff's originating summons for an order for sale.

(g) The success of the defendant's advocates in causing the originating summons to be struck out with costs to be taxed unless otherwise agreed clearly proves that the defendant's advocates had conducted much work and time in putting up a strong defence to oppose the plaintiff's originating summons and the grounds of judgment were also published in [2005] 6 CLJ 471.

(h) The getting up fees of RM5,000 as awarded by the learned taxing master is on the lower side and/or has failed to reflect the amount of work and time that had been expended by the defendant's advocates in preparation to oppose to the plaintiff's originating summons. Further, in this application for review on the getting up fees, the defendant is also applying to set aside the order of costs of

A RM500 that was awarded by the learned taxing master to the plaintiff for the dismissal of the defendant's application for review before the learned taxing master.

(i) The award of RM500 to the plaintiff was not determined nor awarded by the learned taxing registrar upon the merits of the review. There were never any B hearings or submissions presented before the learned taxing registrar on the award of RM500.

(j) It was an unilateral award made by the learned taxing registrar with no regards to the merits and the facts of the case. Further, at all times, the defendant never stated their consent for quantum of the said costs of RM500.

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(k) If the learned taxing registrar felt obliged to award costs to the plaintiff for the said review, it would be more proper for the learned taxing registrar to order the costs to be taxed unless otherwise agreed.

(l) The award of costs of RM500 therefore ought to be forthwith set aside by the court.

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[7] In opposing the review the plaintiff submits as follows

(a) The defendant's request to judge to review taxation herein is only in respect of the quantum of costs awarded. The defendant's complaint is essentially that the E getting up fees of RM5,000 granted to him is inadequate and should be increased.

(b) The law surrounding this area is well settled. It has been expounded in numerous authorities that the court will not interfere with the decision of the taxing registrar upon a mere question of quantum unless it can clearly be F shown the registrar had made an obvious error or acted on mistaken principles in exercising his discretion. This principle was reiterated in *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [2002] 3 MLJ 705

(c) Since the review was only as regards the quantum of costs for getting up, it should not be changed unless there was an error of principle on the part of the G taxing registrar in fixing the amount.

(d) In *Tan Boon Bak Trading Sdn Bhd. v Chua Choong Yin* [2002] 4 MLJ 145, it was stated that a court of review, be it the High Court or the Court of Appeal, will be slow to interfere with the quantum awarded for getting up in a bill of costs.

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(e) In *Chan Kok Choon JP v MBF Finance Bhd* [2001] 1 MLJ 5, it was stated that the learned judge to interfere, there must be some error of principles or some other material error. In *Teo Ah Khing v Yii Chee Ming* [2006] 2 CLJ 188, His Lordship Clement Skinner J in dealing with an application to review the learned deputy registrar's decision on the quantum of getting up costs awarded held that the law on the matter at hand is fairly well settled; it is that the I quantum awarded by the taxing registrar should not be changed unless there was an error of principle on the part of the registrar in fixing the amount.

(f) In relation to the defendant's first ground of objection (ie, the court ignored the fact that it concerned an originating summons for an order for sale in respect of an immovable property). The learned deputy registrar had given due consideration to this point. The learned deputy registrar referred to the relevant parts in his written grounds where it clearly showed he was well aware the matter was an originating summons for an order for sale in respect of an immovable property. This factor was taken into account when he fixed the amount, for getting up.

(g) With regards to the defendant's second ground of objection (ie, the hearing of the originating summons took considerable amount of works and time), the learned deputy registrar had also taken this factor into account in awarding the getting up fee. A perusal of the learned deputy registrar's ruling says that:

> I also did not deny that certain amount of times, works and efforts have been allocated by the learned counsel for the defendant. However, I ruled that the amount of work should commensurate with the advocate's work of which I wholly disagreed to allow RM40,000 as the amount of getting-up is manifestly high and not reasonable to the nature of the issue.

(h) In relation to the defendant's third ground of objection (ie, that the subject matter being an immovable property has its own special value), this factor too had been taken into account by the learned deputy registrar when exercising his discretion. Again, a perusal of the learned deputy registrar's ruling clearly reveals that he had considered and was well aware of the value of the subject matter and says:

> Though the value of the subject matter in the action was RM411,772.46, that does not mean the the Defendant is entitled to a higher rate of getting up after considering the nature of the action and/or the proceedings before the Court. …
>
> Therefore, with respect, I decline to agree to Mr Yi's submission that the getting up in a foreclosure proceedings should be at least RM10,000. This seems to be putting a standard amount that should be awarded and in awarding a getting-up, I am of the view that it should be considered on a case to case basis.

(i) With respect to the defendant's last ground of objection (ie, that the learned taxing registrar erred in law and in fact in failing to consider and/or adopt the unreported Miri High Court's decision the learned registrar in his ruling says:

> … I do not see how I have failed to consider and/or adopt the case of Miri High Court OS No 24-239-2003(MR) since this Court was not shown with the facts of the said case and why the action was struck out. Though it was submitted by Mr Yi, His Lordship had reviewed and allowed a getting up of RM10,000, with respect I do not have the opportunity to have the grounds of decision and the reasons how His Lordship arrived to that decision.
>
> Whether the nature and the facts in the proceedings in Miri High Court is the same or otherwise remains a mystery to us and therefore I am of the view that without clear and proper facts produced before this Court, in ordering the getting up it should depend on a case to case basis."

(j) The learned deputy registrar has not erred in principle in exercising his discretion in awarding the getting up. The reasoning of the learned deputy registrar in dealing with each of the grounds relied on by the defendant clearly shows that there was no error in principle.

(k) The learned deputy registrar had the powers and discretion to grant costs to the plaintiff. The said sum of RM500 was granted to the plaintiff as costs for the defendant bringing the review. As such, the amount is not part of the getting up fee awarded to the defendant. Applying the relevant guidelines and principles laid down by the authorities above, the decision of the taxing registrar should not be changed unless there is an error in principle. The learned deputy registrar had the power to order the defendant to pay costs. In doing so, the order was made well within the ambit of his powers and discretion and the learned deputy registrar cannot be said to have acted on 'mistaken principles/law'.

(l) The defendant's summons to review taxation by judge must be dismissed with costs and that the decision of the learned deputy registrar in awarding RM5,000 as getting up fee and costs of the review of RM500 to the plaintiff, be herein maintained.

[8] I have considered both the plaintiff's and defendant's submission in detail. To decide this review on quantum the test is that it falls on the defendant/applicant to satisfy the court that the learned deputy registrar had erred on a question of principles or had failed to take into account some relevant consideration. The principles in this area of law is well settled. The principles relevant to this review may be summarised as follows:

(a) The object of awarding costs to the litigant is to indemnify him for the expenses he had incurred in successfully establishing his legal rights. O 59 of the RHC provides that costs of incidental proceedings in an action shall be in the discretion of the court. The court shall have full power to determine by whom and to what extent the costs are to be paid. The discretion of the court is very wide, but it has to be exercised judicially and on established principles.

(b) Because costs is in the discretion of the court, there has been a rule of practice of the House of Lord as stated by Viscount Cave LC in *Donald Campbell & Co Ltd v Pollak*, that no appeal would lie for costs only, but the House will however entertain an appeal as to costs, where it is alleged that the order is founded upon an error of law.

(c) An appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should only interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action. The White Book says at p 938:

> On an appeal as to costs where the costs are in the discretion of the Judge the CA will assume that he exercised his discretion unless satisfied that he did not do so

(*Re Rotch* [1909] 54 SJ 30). A fortiori it will not interfere where he assigns reasons therefore which are perfectly germane and not based on any false principle (*Lever Bros v Masboro' Equitable, etc, Society* [1912] 28 TLR 294); nor where there are also other possible grounds for his discretion (*Societe des Hotels Raunis v Hawker* [1914] 30 TLR 423).

(d) Wee Chong Jin C J in *KE Hilborne v Tan Tiang Quee* said:

> It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles. It has also long been well settled that in the exercise of its discretion a court may, if in its opinion there are grounds for it to do so, refuse to award costs to a party who establishes that he has a good cause of action.

(e) In *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25, the Supreme Court stated that an appellate court will be reluctant to interfere with the judge's order on costs. This was because both s 68(1)(c) of the Courts of Judicature Act 1964and O 59 r 3(2)of the RHC had put it beyond doubt that questions relating to costs were matters entirely within the discretion of the court. An appellate court will only interfere if there has been an error of law; or if the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

(f) In *Co-operative Central Bank Ltd v Tan Nyap How* [1997] 4 MLJ 568, the court considered the provision of O 59 of the RHC. Augustine Paul JC (as he then was) made the following observations:

> In taxation review proceedings, the court would have no jurisdiction to interfere with the discretion of the registrar on the issue of quantum unless it could be demonstrated that he had erred on a question of principle or had failed to take into account some relevant consideration. (b) Before discretion could be exercised, sufficient materials must be placed before the decision-maker to enable him to exercise the discretion. (c) The note to item 26 Pt IV App 1 and para 1(2) Pt X App 1 of O 59 of the RHC provided the basis for making the discretionary award under item 26. (d) They identified the materials which must be considered by the registrar in exercising his discretion. (e) The registrar would be able to consider the materials only if they were placed before him in the proceedings in which the award was sought. (f) Thus full particulars of the work done in respect of instructions for trial must be set out in the bill of costs to enable the registrar to settle the quantum of the charges. (g) The burden was on the party bringing in the bill of costs and claiming to be allowed the amount charged therein to show that the amount was fair and reasonable and ought to be allowed. (h) Failure to consider matters which ought to have been taken into account would mean that the registrar had erred in law and that the court could review the exercise of the discretion. In this case the SAR had not considered all the matters stipulated in the note to item 26 and the circumstances as described in para 1(2). (i) The amount awarded by the SAR therefore was based on insufficient particulars and amounted to an error of principle. (j) The lack of particulars also precluded the court from amending the registrar's certificate in order to make a lawful determination. (k) Thus the proper order would be to refer the matter back to the registrar to review his taxation for item 26 upon the defendant submitting a fresh bill of costs with particulars.

(g) In *Gooi Hock Seng v Chuah Guat Khim, Pemegang Harta Pesaka Bagi Eset Chuah Teow Hock, simati* [2002] 3 AMR 3683, the issue before the Supreme Court was in respect of taxation, on the question whether registrar's award on quantum can be interfered and whether interest is payable where an order directs payment of costs to be taxed. The court held that:

> Bearing in mind the decisions in *Coon v Diamond Tread Co* [1938] Ltd [1950] A ELR Vol 2385 and *Gorfin v Odhams Press Ltd* and having considered what was laid down in the Malaysia Court Practice, High Court Vol 1, p 3941, the respondent's application for review of the first and third items ought to be dismissed. The phrase 'as the circumstances require' in O 59 r 36(5), confers on the judge, a discretion which is to be judicially exercised. The registrar's decision should not be interfered with unless there was an error of principal or some other material error and for this purpose, a broad overview of the matter should be taken. The court will not interfere with the decision of the taxing Registrar upon a mere question of quantum if the taxing Registrar has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when the taxing Registrar's decision has been exercised on some wrong principle or the quantum allowed is obviously wrong that the Judge will interfere.
>
> As was laid down by the Federal Court in *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276, interest is payable where an order directs payment of costs to be taxed, and a judgment for damages to be assessed, or for costs to be taxed, carries interest from the entry of judgment and costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation. In the circumstances, interest on costs should have been awarded by the Registrar. In the circumstances, the Registrar's certificate should be amended accordingly, to include interest on costs at 8% per annum from the date of judgment of the appeal in the Federal Court dated April 17, 1993 to the date of realization.

[9] On the issue of quantum, it is apparently clear that the applicant had only succeeded on a procedural point and in ordinary circumstance the getting up fees should have been less than RM2,000 as there is no finality and the plaintiff can refile the charge action. The learned deputy registrar in this case has been very generous with the award, of RM5,000 for the getting up fees.

[10] Taking all factors into account, I take the view that the learned deputy registrar in deciding the quantum had not erred on questions of principles or had failed to take into account some relevant consideration. The strongest point in this taxation proceedings for the defendant/applicant was his right to seek for interest at 8% per annum for the taxed costs from the date of judgment until the date of realisation with a proviso that the court may refuse to do so in the event there was delay in taxing the bill of costs. Since the defendant has not sought for interest I will not make an order.

[11] Further, I disagree with the defendant's contention that the learned deputy registrar ought not have ordered RM500 costs for review by the registrar. The application for taxation or review is an incidental proceedings in an action and the registrar has sufficient powers under O 59to award costs of review as he deems fit. On a similar note I take the view that for this 'summons to review taxation by the judge' the court may order costs. It will be preferable in such cases to award a fixed

sum of costs as was done by the learned deputy registrar. In this case the plaintiff/respondent should be granted costs as I find that the lengthy arguments put forward by the defendant/applicant on settled principles of law has taken much of the plaintiff's as well as judicial time.

[12] For the reasons stated above, it is my judgment that the order of the learned deputy registrar must be sustained and the defendant's application for review must be dismissed and further the defendant/applicant must pay the sum of RM3,000 to the plaintiff/respondent as costs for this review made under O 59 r 36(1) of the RHC. I hereby so order.

Application dismissed with costs.

Reported by Eugene Daniel Louis